

**EXHIBIT A**

***Plaintiff's Response Memorandum in Opposition to Defendant  
Cemex, Inc Request For Judicial Notice [DE 57]***

Rune Kraft  
rk@kraft.legal  
Kraft Legal | United States  
108 West 13th Street  
Wilmington, Delaware 19801  
302 408 1000

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Rune Kraft,  
Plaintiff,

vs.

Chevron Corporation, et al.,  
Defendants.

Case No. CV-21-00575-PHX-DJH

The Honorable Diane J. Humetewa

**PLAINTIFF'S RESPONSE  
MEMORANDUM IN  
OPPOSITION TO DEFENDANT  
CEMEX, INC.'S REQUEST FOR  
JUDICIAL NOTICE (DOC. 30)**

## Affidavit of Rune Kraft

I, Rune Kraft, based on personal knowledge, declare:

The Minute Order dated March 24, 2016, from Case No. CV-15-00701-VBF is fraudulent. Plainly, the Court's description of the facts never happened. Further, the order rests on orders/judgments issued in Case No. CV10-1776 VBF-OP, which are legal nullities because they were issued by a court that lacked jurisdiction. I submitted a motion for a subpoena to be issued to address these malicious portrayals. See Doc. 31. The controversy is subject to ongoing litigation.

The Statement of Decision dated March 9, 2018, from Case No. CV-16-04479-JFW-SSX is incorrect. The controversy is subject to ongoing litigation.

The Ruling dated January 17, 2018, from Case No. CV2017-000765 is fraudulent. Further, the ruling is a legal nullity because the court lacked jurisdiction. The controversy is subject to ongoing litigation.

The Decision dated March 28, 2019, from Case No. 1 CA-CV 18-0179 is fraudulent. Further, the ruling is a legal nullity because the court lacked jurisdiction. The controversy is subject to ongoing litigation.

The Order dated November 25, 2019, Case No. CV-19-05181-PHX-JJT is wrong, and the matter is subject to ongoing litigation.

The Order dated February 12, 2021, Case No. CV-19-5697-PHX-JJT is wrong, and the matter is subject to ongoing litigation.

I am competent to testify to the facts set forth in this declaration and declare under the penalty of perjury of the laws of the United States of America that the foregoing statements are true and correct.

DATED this 9<sup>th</sup> day of August 2021.



Rune Kraft

1 In the Ninth Circuit, defendants typically have two tools available to ask a court to consider  
2 in connection with a motion to dismiss information outside the four corners of a complaint. First,  
3 a defendant may file a request for judicial notice under Rule 201 of the Federal Rules of Evidence  
4 to ask the court to consider material outside of the complaint, so long as the material meets the  
5 definition set forth in Federal Rule Evidence 201 as "not subject to reasonable dispute because it  
6 (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and  
7 readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid.  
8 201(b). Second, under the incorporation by reference doctrine, a district court may consider  
9 documents "whose contents are alleged in a complaint and whose authenticity no party questions,  
10 but which are not physically attached to the [plaintiff's] pleading." *In re Silicon Graphics Inc. Sec.*  
11 *Litig.*, 183 F.3d 970, 986 (9th Cir. 1999). This doctrine seeks to prevent plaintiffs from selectively  
quoting only portions of documents on which their claims are based.

12 The application of these tools was addressed in a published Ninth Circuit opinion, *Khoja*  
13 *v. Orexigen Therapeutics*, Case No. 16-56069 (9th Cir. 2018), in which the panel noted a  
14 "concerning pattern in securities cases" in which "overuse" of the doctrines of incorporation by  
15 reference and judicial notice has resulted in the dismissal of securities suits at the pleading stage  
based on materials outside of the complaint. (Order at 15.)

16 In a decision issued on August 13, 2018, a unanimous three-judge panel affirmed in part  
17 and reversed in part the district court's dismissal of a securities fraud action, concluding that "the  
18 district court abused its discretion by improperly considering materials outside of the Complaint."  
19 (Order at 4.)

20 The plaintiff brought a putative class action against defendant biotechnology company  
21 Orexigen and its officers, alleging that the defendants made material misrepresentations and  
22 omissions in violation of the Securities Exchange Act of 1934 based on the company's disclosure  
23 of early results from a study of its new drug. The defendants moved to dismiss the complaint and  
24 requested judicial notice of 22 documents or, alternatively, that the district court treat those  
25 documents as incorporated into the complaint. The district court granted the request with respect  
26 to 21 of 22 documents. The court also granted the defendants' motion to dismiss. The plaintiff  
appealed.

1 In concluding that the district court abused its discretion by considering some of those  
2 documents, the panel noted "a concerning pattern in securities cases like this one: exploiting these  
3 procedures improperly to defeat what would otherwise constitute adequately stated claims at the  
4 pleading stage." (*Id.* at 15.) The panel stated that this trend of "unscrupulous use of extrinsic  
5 documents" at the pleading stage creates a risk "especially significant in SEC fraud matters, where  
6 there is already a heightened pleading standard, and the defendants possess materials to which the  
7 plaintiffs do not yet have access." (*Id.*) "If defendants are permitted to present their own version  
8 of the facts at the pleading stage—and district courts accept those facts as uncontroverted and  
9 true—it becomes near impossible for even the most aggrieved plaintiff to demonstrate a  
sufficiently 'plausible' claim for relief." (*Id.* at 16.)

10 As to the judicially noticed facts, while the district court stated "it would not 'take notice  
11 of the truth of the facts cited' within the exhibit" (*Id.* at 17), it took judicial notice of three  
12 documents: a transcript of an investors' conference call, a medical report about the drug at issue,  
13 and the historical record of the company's patent application for the drug. The panel concluded  
14 that certain facts from the medical report and the transcript should not have been judicially noticed  
15 because there existed "reasonable dispute" as to what the documents established. (*Id.* at 17-22.)  
16 As to the transcript, the panel held that it was "improper to judicially notice a transcript when the  
17 substance of the transcript is subject to varying interpretations, and there is a reasonable dispute  
18 as to what the transcript establishes." (*Id.* at 19 (quotation omitted).) However, the panel  
19 concluded that the date of the conference call could be properly noticed from the transcript. (*Id.*  
20 at 18.) The appellate court similarly concluded that the court did not abuse its discretion in taking  
21 notice of the patent application, as the court only relied on the application for the date of the  
22 application.

23 The panel also reviewed the documents the district court incorporated by reference,  
24 including blog posts and news articles, analyst reports, SEC filings and attachments. In concluding  
25 that the district court abused its discretion in incorporating by reference at least seven of these  
26 documents, the panel noted that "the doctrine is not a tool for defendants to short-circuit the  
resolution of a well-pleaded claim" and "what inferences a court may draw from an incorporated  
documents should also be approached with caution." (*Id.* at 24.) Specifically, the appellate court  
concluded that the district court abused its discretion because the complaint's reference to the

documents were not "sufficiently extensive" or the documents did not "form the basis of any claim in the Complaint." (*Id.* at 26.) Notably, the panel concluded that the trial court appropriately incorporated by reference some of the disputed documents that were mentioned extensively in the complaint.

The *Khoja* opinion cautions of the "overuse" of these methods and the resulting inefficiency from the court's perspective.

The Defendant's request for judicial notice comprises deceptions, obfuscations, lies, false statements. See above affidavit.

Thus, the Defendant is abusing and overusing the doctrines of judicial notice by piling on volumes of exhibits to their motion making the briefing needlessly unwieldy and demanding the court's "precious time" to review. (*Id.* at 30-31.)

Pursuant to Federal Rules of Evidence, Rule 201(e), if the court is inclined to take judicial notice, Plaintiff requests an opportunity to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed.

Respectfully submitted on this 9<sup>th</sup> day of August 2021.



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Plaintiff